UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

POST-HEARING BRIEF OF RESPONDENT

I. INTRODUCTION[1]

This proceeding came before Administrative Law Judge Andrew S. Gollin on May 31, 2017, through June 2, 2017, in Cincinnati, Ohio. The case concerns an Amended Complaint and Notice of Hearing ("Complaint") issued by Region 9 of the National Labor Relations Board ("Board"), based on a second amended unfair labor practice charge ("Charge No. 09-CA-184215") filed by the International Brotherhood of Teamsters, Local Union No. 957 ("Union"), alleging Mike-Sell's Potato Chip Company ("Mike-sell's" or "Company") violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act") by (1) refusing to bargain over its decision to sell sales territory to independent distributors; (2) refusing to provide information sought by the Union for such decisional bargaining; and (3) selling Company vehicles to or entering contracts with independent distributors.

Contrary to the General Counsel's contentions, the Company's decision to sell routes in order to effect a change in its business model is not a mandatory subject of bargaining. Rather, the Company's ongoing shift in the scope and direction of its enterprise is consistent with past practice, the Expired Contract, the Revised Final Offer, the Paolucci Award, and controlling law. (JX-1; RX-2; RX-3.) The General Counsel has presented no evidence of improper motive to discredit the Company's judgment

[1]Joint Exhibits, General Counsel Exhibits, Charging Party Exhibits, and Respondent Exhibits are parenthetically referenced as "JX-___," "GC-___," "CP-___," and "RX-___," respectively. Transcript pages are parenthetically referenced as "Tr. ___."

about which business models to follow or which business units to retain.[2] And because the Union cannot force Mike-sell's to bargain or produce information regarding non-mandatory subjects, such as the decision to sell its sales territory, the Company was not required to respond to the Union's August 31st information request, which was made for the stated purpose of such decisional bargaining. Finally, the Union's second Charge amendment ("Second Amendment")—filed on May 31, 2017, the morning of the hearing—is untimely, does not relate back to the original charge, and is completely lacking in merit. For all of these reasons, which will be further detailed herein, Mike-sell's respectfully submits that the Complaint is without merit and should be dismissed in its entirety.[3]

II. STATEMENT OF FACTS / PROPOSED FINDINGS OF FACT

A. Historical Evolution of the Company's Business Model

Mike-sell's is a privately-held manufacturer of snack foods headquartered in Dayton, Ohio. (Tr. 232.) For over 100 years, Mike-sell's has manufactured and packaged snack products at its Dayton plant and then distributed them to retailers in Ohio, Indiana, Kentucky, Illinois, Michigan, and Pennsylvania through the help of route sales drivers ("drivers") and independent distributors ("distributors"). (Tr. 233-34.) Drivers are employed as part of the Company's route sales division. (Tr. 232, 234.) They are commissioned employees whose duties include loading trucks, traveling to customer locations, stocking shelves, taking retail inventories and replenishing product, performing point-of-sale marketing, and rotating and removing unsold or expired product. (Tr. 70-71, 186-88, 235, 946-49.) In contrast, distributors are independently-owned businesses that take on the entire risk of loss by choosing the type and amount of product to market, buying that product outright from Mike-sell's, preparing merchandise displays, delivering, and re-selling the product to customers in order to recoup

[2] Mike-sell's has never sold routes for the purpose of discriminating against the Union or eroding its support. This is perhaps best evidenced by the fact that the Union voluntarily withdrew its 8(a)(3) allegation as confirmed via letter from the Regional Director dated March 13, 2017. *Compare* GC-1(a) (including 8(a)(3) allegation) *and* GC-1(c) (including 8(a)(3) allegation) *with* GC-2 (excluding 8(a)(3) allegation). In fact, Mike-sell's strategically planned all route eliminations in 2016 to coincide with driver resignations or retirements so as to avoid the need for layoffs. (Tr. 113, 182, 248-49, 377, 408.)

[3] As explained further in the Argument Section of this Brief, even if some remedy were to be ordered, Mike-sell's contends that the relief sought by the General Counsel is grossly overbroad, unduly burdensome, and indicative of a strategic attempt to obtain relief in a wholly unrelated Board case.

their own costs and (hopefully) make a profit. (Tr. 245, 562-64, 583-84, 590-607, 958, 962, 964-66, 969-71, 980, 988.) For sales territories or "routes" serviced by distributors, the Company essentially sells the right to market its product within a specified geographic area,[4] and the distributors purchase Company product up-front and are thereafter the owners of that inventory and all the liability that comes with it. (Tr. 556-57, 595-96, 600-02, 613-14, 989.) On the whole, distributors have historically been responsible for servicing a far greater sales territory—and distributing far more Company product—than drivers. (Tr. 246-47, 372; RX-2, p. 5.)

Company drivers are represented by the Union. Their employment was formerly governed by a labor agreement effective November 17, 2008, to November 17, 2012 ("Expired Contract"). (Tr. 136, JX-1.) From November 18, 2012, through June 12, 2013, drivers worked under the Company's unilaterally-implemented last, best, and final offer ("Final Offer").[5] (Tr. 315-16.) Since June 13, 2013, however, drivers have worked under the Company's revised last, best, and final offer ("Revised Final Offer"), which Mike-sell's contends was lawfully implemented after the parties reached a good faith impasse in June 2013.[6] (Tr. 273, 316; RX-3.)

Mike-sell's has been in business for over a century, but since about 2006, significant losses have forced the Company to rethink its business plan.[7] (Tr. 234-35, 238.) One of the Company's key strategic objectives is to focus more on manufacturing and branding quality products, which is its biggest strength and most promising area for growth and profitability. (Tr. 244, 246.) In contrast,

[4] For the sake of brevity and to avoid confusion, Mike-sell's will hereinafter refer to its individual sales territories as "routes" throughout this proceeding. However, unlike Mike-sell's drivers, distributors are not actually required to follow any particular route or schedule, or to service any particular customer, within their individual sales territory. (Tr. 586-87, 625-26, 967, 996, 998.)

[5] The Company's Final Offer has no relevance to this dispute. The Board ultimately found the Company's unilateral implementation of its Final Offer to be unlawful. The Board's Order was later enforced by the U.S. Court of Appeals for the District of Columbia Circuit, although the Circuit Court recognized that the situation presented "a close case." *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318, 319 (D.C. Cir. 2015).

[6] Consistent with Sections 10616 and 10646.1 of the Board's Casehandling Manual for Compliance Proceedings ("Manual"), the Regional Director has already recognized a "legitimate dispute" over the validity of the Revised Final Offer through the issuance of a Compliance Specification in Board Case No. 09-CA-094143, which expressly admits that "a controversy presently exists over whether the parties reached a good faith impasse about June 13, 2013." The lawfulness of the unilaterally-implemented Revised Final Offer has yet to be determined.

[7] The main reason for these losses is the competitive imbalance between Mike-sell's and its primary competitors, Frito-Lay and retailer private-label products. (Tr. 235.) Unlike Frito-Lay and private-label brands, Mike-sell's cannot afford to intentionally discount its product so deeply as to take a temporary loss in order to steal away coveted shelf space and sales volume from smaller companies. (Tr. 236.) The Company's financial condition and competitive struggle are not unique in its industry. (Tr. 236.) Across the country, local snack manufacturers consider Frito-Lay and private-label brands to be very large, fierce competitors with the ability to price local concerns out of business. (Tr. 236.)

Mike-sell's is not interested in growing its Company route sales division, which has lost money hand-over-fist for more than a decade because of the high cost of overhead and high risk of loss.[8] (Tr. 237; 244.) The Company has gradually reduced its Company route sales division by selling certain routes to distributors who buy the product up-front, directly from Mike-sell's—thereby accepting the entire risk of loss.[9] (Tr. 245.) These distributors then have the exclusive right to re-sell Mike-sell's products as they see fit to retail and wholesale customers within their designated area.[10] (Tr. 245.) Some early examples of this business plan evolution—none of which the Union challenged—are as follows:[11]

- In early 2009, one route was sold to Snyder's of Berlin. The displaced driver had the chance to bump into another route, but she chose to resign. The Union was notified of the decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, p. 7.)

- In late 2009, Mike-sell's sold two routes to Ohio Citrus. Both displaced drivers could bump into other routes, but one chose to resign. The Union was notified of the decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, p. 7.)

- In late 2010, Ohio Citrus returned the two routes it purchased in 2009. Mike-sell's brought one route back in-house and reassigned it to a driver, but the other route was re-sold to Snyder's of Berlin. The Union was notified of these decisions, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, p. 7.)

- In mid-2011, Snyder's of Berlin returned the route it bought in 2010. Mike-sell's no longer wanted it, so it was mainly abandoned, except for a small part that was merged into an existing route. The Union was notified of this decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, pp. 7-8.)

- In late 2011, Mike-sell's sold the newly-merged route, plus one more, to Buckeye Distributing. Displaced drivers bumped into other routes. The Union was told of the decisions, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (RX-2, p. 8.)

[8] For the 11-year period spanning from 2006 through 2016, Mike-sell's suffered an overall operating loss of approximately $5 million. (Tr. 243-44.) The greatest contributor to this overall operating loss was the Company's route sales division, which had losses exceeding $9 million during the same 11-year period. (Tr. 237, 244.)

[9] In 2011, Mike-sell's employed about 80 drivers. (RX-2, p. 5.) In 2012, the Company was forced to close three distribution centers and sell dozens of routes to distributors, reducing its workforce to around 35 drivers. (Tr. 690-91.) The number of drivers has further declined over the past five years, partially due to the sale of routes and partially due to route consolidations/mergers. (Tr. 247-48.) Mike-sell's currently employs 14 drivers who collectively serve 12 routes. (Tr. 246-48.) The rest of the Company's over 170 routes are serviced by distributors. (Tr. 247.)

[10] Distributors can schedule their own sales appointments, and expand their own territories, either by client or by geography, without prior approval from Mike-sell's. (Tr. 599-600, 967.) For example, TMT, on its own initiative expanded its territory into northern Ohio and Michigan. (Tr. 600-02.)

[11] The Union never denied that its Stewards received advance notice of these routes sales; the Union simply insisted that notice given to its Stewards—as opposed to its Business Agents—was ineffective. (RX-43, pp. 11-12.) The Paolucci Award rejected this argument, as "[t]o find otherwise would mean that the Company would have to second guess every communication it had with the Union Steward." (RX-2, p. 19.)

The Company's right to change distribution methods by selling routes to distributors was confirmed in 2012, through an arbitration award issued by Arbitrator Michael Paolucci ("Paolucci Award").[12] (Tr. 151-52, 163-64, 259-60, 263-64, 273-74, 874-75; RX-2.) This was the first time the Company's decision to sell routes had been challenged, and the Union cited Article I (Recognition), Article II (Union Security), and Article VIII (Seniority) of the Expired Contract to support its grievance. (RX-2, p. 3-4.) The Union demanded, as a remedy, that Mike-sell's bargain over the decision and its effects. (RX-2, p. 2.) After a full evidentiary hearing, Arbitrator Paolucci denied the grievance based on Section 5 of Article VIII-B (Route Bidding) of the Expired Contract,[13] as well as the Company's inherent entrepreneurial right to determine the nature, scope, and direction of its enterprise, and the manner in which it conducts business. (RX-2, p. 16-20.)

The Paolucci Award emphasized that Mike-sell's transfers both the risk and potential reward by selling routes to distributors, which distinguishes the situation from typical subcontracting.[14] (RX-2, pp. 16-17.) Because an entire sales territory—or business unit—is sold to a third party, Mike-sell's "reduce[s] its involvement to that of a supplier." (RX-2 p. 17.) Unlike a subcontracting arrangement, the decision to sell routes necessarily involves a calculation of multiple factors beyond mere cost savings, such as return on investment and net impact on profitability of the whole enterprise. (RX-2 pp. 17-18.) It essentially involves "a whole new method of doing business," whereby Mike-sell's "loses all control" of the distribution. (RX-2 pp. 18-19.)

The Paolucci Award further confirmed that Article VIII-B of the Expired Contract—which recognizes the Company's right to "eliminate a route"—applies equally where routes are entirely abandoned and where routes are sold to distributors. (RX-2 p. 20.) And while not requiring route

[12] The Paolucci Award was issued during the term of the Expired Contract, which is the document the Union and the Regional Director believe should still govern drivers' employment today. (RX-2, pp. 13-14.) However, the route elimination provisions in Article VIII-B of the Expired Contract are substantively indistinct from those in Article 11 of the Revised Final Offer. (JX-1, pp. 16-17; RX-3, p. 9.)

[13] Article VIII-B - Section 5 of the Expired Contract provides (in part): "In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee." (JX-1, pp. 16-17.)

[14] Arbitrator Paolucci's Award seems to inadvertently confuse the number of routes owned/serviced by distributors with the number of distributors who own/service the routes. (RX-2, p. 5.) It is common for several routes to be owned/serviced by one distributor. (Tr. 390; RX-16.) Thus, as of June 27, 2012 (i.e., the date of the arbitration), Mike-sell's had about 70 routes run by drivers and over 100 routes run by distributors. (Tr. 246-47.)

eliminations to be financially justified, the Paolucci Award nevertheless recognized the untenable situation that could result if the grievance were sustained: Mike-sell's could be "forced to keep non-performing assets (in the form of a route)" and "forced to continue a business activity that loses money every day." (RX-2, p. 18.)

After the Paolucci Award issued, the Company route sales division continued to flounder.[15] (Tr. 305; RX-15.) Mike-sell's thus relied on the Paolucci Award (as well as controlling law) to eliminate over three dozen more routes after the term of the Expired Contract ended.[16] (Tr. 151-52, 263-64, 305-08, 336-37, 340, 358, 362, 757.) Several of these routes were later returned to Mike-sell's and thereafter re-sold to new distributors.[17] (Tr. 326-27, 330-31, 348-50, 358, 700-02.) Mike-sell's notified the Union of each elimination decision and its effective date, and the Company further offered to bargain over any effects. (Tr. 318, 337-38, 345, 752-53, 757-59; RX-8.) The Union neither requested to bargain over the decision to sell the routes nor filed a grievance or unfair labor practice charge to challenge the route eliminations.[18] (Tr. 308, 318, 321, 340, 346, 357, 360.)

B. Events Precipitating the Instant Complaint

In April 2016, Mike-sell's announced it would explore the possibility of selling more routes to distributors. (Tr. 73-74, 147-48, 363-65; JX-2.) Mike-sell's wanted to explore opportunities for operational and strategic business changes that would allow the Company to "focus more on manufacturing and branding." (Tr. 151-52, 244, 364, 374, 898.) By letter to the Union dated April 27, 2016, Mike-sell's promised to "provide . . . timely notice of its decision" and "honor its obligation to bargain over the effects of the route elimination(s)." (JX-2.) The Union filed a grievance to challenge the

[15] It is undisputed that Mike-sell's provided the Union with copies of requested Profit-and-Loss Statements for the Company's entire route sales division for recent years, all of which reflect large-scale losses. (Tr. 475-76; RX-15.)

[16] On November 18, 2012, Mike-sell's sold 16 Cincinnati routes, 10 Columbus routes, and 3 Sabina routes to Buckeye Distributing. (Tr. 303-04.) About six months later, Mike-sell's sold 5 Greenville routes to Gaudio Distributing effective June 1, 2013. (Tr. 316-17, 751; RX-6; RX-32.) The Company then sold 4 Springfield routes to Helm Distributing on August 18, 2013. (Tr. 336-37, 757; RX-33.)

[17] For example, Helm Distributing returned the 4 Springfield routes and Gaudio Distributing returned the 5 Greenville routes after servicing them for a couple years, and Mike-sell's thereafter re-sold all 9 Greenville/Springfield routes to The Big TMT Enterprize LLC in December 2015. (Tr. 348-50, 354-55, 586-87, 616-17, 619, 630-31, 637, 762; RX-1; RX-16.)

[18] The parties did bargain over the effects of these route eliminations, specifically coming to an agreement with the Union regarding special bumping rights and severance. (Tr. 306-07, 342.)

Company's intent to sell additional routes, citing several provisions of the Expired Contract that would allegedly be violated if any route sales came to fruition. (Tr. 74-75, 148-49, 167, 366, 780, JX-4.) However, the Union made no demand to bargain over the issue. (Tr. 173-74.) Mike-sell's processed the Union's grievance, but there was no labor contract under which to arbitrate. (Tr. 80, 152.)

On July 11, 2016, Mike-sell's notified the Union of its decision to sell Route 102, covering the area around greater Xenia, Ohio. (Tr. 80-82, 153, 376; JX-5.) The Union raised no objection to this decision, nor did the Union demand to bargain or file a grievance to challenge it. (Tr. 82, 376-77.)

On August 29, 2016, Mike-sell's notified the Union of its decision to sell Routes 104 and 122, covering territory in Bellbrook and Beavercreek, Ohio. (Tr. 82-83, 154-55; JX-6.) The Union filed a grievance to challenge the sale of both routes.[19] (Tr. 83-84, 155; JX-7.) The Union also sent Mike-sell's a letter demanding to bargain over the decision to eliminate Routes 104 and 122, as well as seeking documents purportedly necessary for the requested decisional bargaining. (Tr. 156-157, 89; JX-8.)

On September 12, 2016, Mike-sell's replied to the Union's demand, declining to engage in decisional bargaining over elimination of the routes and further declining to produce information requested for the specific purpose of such decisional bargaining.[20] (86-88, 157; JX-9.) The Company explained its position in detail, citing specific passages from the Paolucci Award. (157-58; JX-9.) However, Mike-sell's also reiterated its willingness to bargain over the effects of any route eliminations,[21] as well as its willingness to produce information relevant or necessary for the Union to perform its statutory duty to bargain over <u>mandatory</u> subjects. (JX-9.)

Also on September 12, 2016, Mike-sell's notified the Union of its decision to sell Route 131, covering territory in Middletown and Springboro, Ohio. (Tr. 90, 159-60, 406; JX-10.) The Union filed

[19] Once again, Mike-sell's accepted and processed the grievance, but there was no labor contract under which to arbitrate. (Tr. 152-53, 161, 172.)

[20] Just a few days earlier, Mike-sell's had already given the Union requested copies of Profit-and-Loss Statements for the Company's route sales division for multiple years. (Tr. 476-78, 480-81, 882-85; RX-15; RX-40.) Moreover, just a few days later, Mike-sell's provided the Union with complete copies of its audited financial statements for the years 2012 through 2015. (Tr. 482-83; RX-42.)

[21] The Union never requested to engage in effects bargaining. (Tr. 249.) In any event, the sales of the four routes coincided with drivers' resignations or retirements, so there were no layoffs—just a rebid of routes. (Tr. 113, 182, 248-49, 377, 408.)

a grievance over the sale of Route 131,[22] as well as Charge No. 09-CA-184215 challenging the elimination of all four routes since July 2016.[23] (Tr. 90, 117, 159-60, 409; JX-11; RX-38.)

The elimination of Routes 102, 104, 122, and 131 collectively resulted in the one-time liquidation of Company assets valued at $126,000,[24] as well as annual savings of nearly $195,000 for non-labor expenses.[25] (Tr. 538-541-42.) The four route eliminations also resulted in approximately $229,000 in annual labor cost savings,[26] but these savings would be offset by the higher cost of distributor margins totaling $324,000 for the same time period.[27] (Tr. 540.) In the end, when the annual labor and non-labor cost savings were collectively measured against the cost of distributor margins, Mike-sell's expected to realize over $89,000 in savings per year. (Tr. 540, 548.)

For a regional family business like Mike-sell's, with total net assets of only $5.8 million,[28] the one-time capital recoupment combined with the annual savings meant that well over $200,000 would be returned to Company coffers within 12 months. (Tr. 539-40.) Projecting the 2016 route eliminations to increase the Company's net worth by almost 3.5% in the first year alone, Mike-sell's had newfound confidence to reallocate resources and make major improvements in its manufacturing plant.[29] (Tr. 549-50.) The four route eliminations also reduced the time managers spent running routes to cover for

[22] Once again, Mike-sell's accepted and processed the grievance, but there was no labor contract under which to conduct an arbitration. (Tr. 80, 152.)

[23] On December 9, 2016, the Union amended its unfair labor practice charge, limiting the 8(a)(5) allegation of failure to provide information to the Union's requests related to decisional bargaining over the sale or routes rather than the Union's requests related to "contract negotiations." (*Compare* GC-1(a) *with* GC-1(c).)

[24] This total capital recoupment came from the liquidation of four sales territories ($74,000), four trucks ($34,000), and warehouse- and truck-stored inventory ($18,000). (Tr. 541-52.) Although the sale of the territories and trucks were financed and thus resulted in a steady income stream over time, the Company's lenders immediately recognized the full value of the sales as "receivables" on its balance sheet, which enabled Mike-sell's to obtain a credit line increase after the four sales were consummated. (Tr. 544-47.)

[25] The annual non-labor cost savings of almost $195,000 resulted from elimination of one management position ($108,000), one part-time warehouse position ($14,000), maintenance and fuel for four trucks ($57,000), more than 20% of all stale product costs ($6,000), and commercial insurance on four trucks ($4,500), as well as a new-found revenue source in the form of rental payments for handheld scanners ($4,500). (Tr. 539-40.)

[26] The annual labor cost savings resulted from elimination of commissions ($152,000), pension contributions ($35,000), healthcare ($7,000), life insurance ($1000-$2000), federal/state taxes ($13,000), workers' compensation premiums ($6,000), and paid time off benefits ($14,000). (Tr. 539.)

[27] Mike-sell's used the actual sales for the four routes in question to determine the would-be distributor margins for the same time period. (Tr. 540.)

[28] Net shareholder equity as of March 31, 2017, was $5.8 million. (Tr. 284.)

[29] In March 2017, for example, Mike-sell's invested over $260,000 to build and install a new overhead conveyor system in its manufacturing plant. (Tr. 549-55; RX-27; RX-28.) The Company's old system was still functioning as designed, but as compared to modern technology, it operated very slowly, produced excess waste and noise pollution, and often required expensive maintenance and hard-to-find parts. (Tr. 550.) Since its installation in February 2017, the new overheard conveyor has increased overall efficiency and reduced down time, waste, and maintenance costs. (Tr. 549-50.) Mike-sell's would not have been able to replace its overhead conveyor if not for the sale of the four routes in 2016. (Tr. 553.)

unplanned driver absences, a distraction consuming about 55 workdays per year before the route sales but only about 14 workdays per year after the route sales.[30] (Tr. 542-43.) Since recapturing an estimated 41 management workdays—about two full work months—per year, Mike-sell's has been able to significantly increase the time dedicated to calling on high-volume clients, selling incremental displays, managing customer relations concerns, updating point-of-sale merchandising and resetting retailer shelves, promoting new products, and generating new accounts. (Tr. 542-43.)

Mike-sell's also reaped several intangible benefits from its sale of routes in 2016. For example, the Company reduced its risk of loss due to fraudulent transactions and uncollectible customers, as well as lost, stolen, and damaged property from within its trucks, warehouses, and distribution centers. (Tr. 543, 834-35.) In addition, distributors are generally a more motivated sales force than Company drivers because distributors have no weekly minimum salary or paid time off benefits upon which to rely. (Tr. 543-44.) If distributors take time off work without finding coverage, or do not sell all the product they order, or do not price the product at a profitable level, then they can sustain business losses that keep them from bringing home any income at all. (Tr. 605, 669-70, 972.) This has happened on at least a few occasions since the routes were sold in 2016. (Tr. 669-70, 972.)

Despite submission of well-reasoned position statements summarizing the Company's response to the Union's Charge, the Board's Regional Director for Region 9 ("Regional Director") issued the Complaint on March 17, 2017, seeking (in part) "an order requiring . . . [Mike-sell's] rescind the sales of its Ohio Routes #102, #104, #122 and #131 and assign those routes to Unit employees," and setting a hearing date of May 31, 2017. (GC-1, ¶ 11.) Meanwhile, the Regional Director filed a Petition and Memorandum in Support for 10(j) Injunction ("Petition"). *See* Petition filed in *NLRB v. Mike-sell's Potato Chip Co.*, No. 3:17-CV-126, ECF 1 and ECF 1-1 (S.D. Ohio April 12, 2017). The Petition was promptly denied, with the U.S. District Court remarking that "[t]his is not a case . . . where the employer

[30] These before-and-after estimates are based on an average of full-year absenteeism statistics for 2014 and 2015 versus partial-year absenteeism statistics (annualized) for 2016 and 2017. (Tr. 542-43, 831-32.)

flouted its obligations under the Act," as "the Company's position "has substantial support in the caselaw . . . ." *Mike-sell's*, ECF 18, 2017 WL 2311295, at *9 (S.D. Ohio May 26, 2017).

C. The Rights and Responsibilities of Independent Distributors

Routes 102 and 131 were sold to The Big TMT Enterprize LLC ("TMT"), a small business owned by Independent Distributor Charles T. Morris ("Morris"). (Tr. 350-52, 378-79, 406-07; RX-1; RX-10; RX-12.) TMT paid Mike-sell's $29,600 for its two routes, as well as $8,000 for a truck. (Tr. 506, 509-10; RX-17, 18, 20.) Routes 104 and 122 were sold to BLM Distributing LLC ("BLM"), a small business owned by Independent Distributor Lisa Krupp ("Krupp").[31] (Tr. 382-83; JX-12; RX-11.) BLM paid Mike-sell's $39,000 for its two routes, as well as $10,000 for a truck.[32] (Tr. 507; RX-17, 19.) By becoming distributors for Mike-sell's, both BLM and Big TMT had purchased the "exclusive right to distribute Mike-sell's products within a given territory."[33] (Tr. 485.)

Prior to selling any routes, Mike-sell's meets with prospective buyers to see which routes they are interested in purchasing and to discuss their business plan. (Tr. 173, 512.) Mike-sell's met with Krupp at least two or three times and with Morris at least three or four times regarding the sale of the routes. (Tr. 513, 955.) The Company wanted to ensure that they had the requisite industry knowledge, work experience, and skill set to succeed, as they would receive no training from Mike-sell's. (Tr. 605, 794, 797-99, 973.) In addition to these meetings, Krupp and Morris were required to complete an Independent Distributor Application ("ID Application"), disclosing (among other things) their financial condition and assets, their banking relationships and account balances, their real estate, any outstanding loans or unpaid taxes, and their contingent liabilities. (Tr. 513-14; RX-21; RX-22; RX-23; RX-24.)

[31] For about nine years, Krupp worked as a Union driver employed by Mike-sell's, but she decided to take the opportunity to start her own business when the Company announced its intention to sell additional routes in 2016. (Tr. 945.)

[32] Notably, although both BLM and TMT opted to buy a truck from Mike-sell's, neither had to do so, as Mike-sell's sets no requirements for its distributors' vehicles or businesses. (Tr. 487, 492, 569, 593-94, 596-602, 960-61, 963, 966, 968, 971-73.) In fact, BLM considered buying trucks from other vendors, and TMT did buy several trucks from other vendors. (Tr. 593, 959.)

[33] Although not required to do so, both BLM and TMT utilized financing available through Mike-sell's for the purchase of their routes and trucks. (Tr. 492, 506, 960; RX-18; RX-19; RX-20.) Each loan had a 3% interest rate, and both BLM and TMT executed promissory notes specifying a payment schedule and subjecting them to fines and penalties, and ultimately default, if they were late in making their payments to Mike-sell's. (Tr. 492, 560, 960; RX-18, 19, 20).

Mike-sell's also typically requires prospective buyers to submit to a credit check and an asset inventory, as well as to submit evidence of their corporate status and their articles of incorporation or formation.[34] (Tr. 513-14; RX-21, pp. R00596-R00600; RX-22, pp. R00618-R00635.) Because Mike-sell's wants to partner with distributors in a way that both businesses succeed, the Company declines to work with prospective buyers who lack industry knowledge or fail to provide sufficient financial information. (Tr. 522, 524; RX-23; RX-24).[35]

Just to start out as a distributor, both BLM and TMT made significant investments far beyond their territory and trucks, including but not limited to (1) procuring storage space;[36] (2) assuming the immediate expense of existing Company inventory from trucks and warehouses;[37] (3) renting handheld scanners;[38] (4) purchasing general commercial liability insurance; (5) retaining their own attorneys and accountants; (6) paying for insurance, repairs, and maintenance on trucks; (7) establishing their own corporate entity; and (8) paying their own taxes and those of their employees. (Tr. 590-94, 605, 962, 965, 973; JX-12; RX-16.) Finally, BLM and TMT each entered into an Independent Distributor Agreement ("Agreement") with Mike-sell's.[39] (Tr. 389; JX-12; RX-16.) Parts of the Agreements, including the margins paid to distributors, were negotiable. (Tr. 704.) In fact, between different distributors, margins currently vary by as much as 7%. (Tr. 706.)

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[34] Though Krupp formed BLM for the express purpose of purchasing routes from Mike-sell's, the Company did not assist her in establishing her business or preparing or filing the appropriate paperwork. (Tr. 986.)

[35] The hiring process for drivers is quite different than the purchasing process for distributors. (Tr. 529.) The Company's Employment Application is much less extensive and devoid of sensitive questions about finances and liabilities, and driver applicants are not subject to credit checks and asset inventories. (Tr. 134, 203, 534; RX-25.) However, driver applicants are subject to a drug screen, a physical examination, and a criminal background check, whereas prospective distributors are not. (Tr. 529, 532, 533-34, 982; RX-31.) The interview process is also different, with driver candidates interviewed by human resources and distributor candidates interviewed by sales and marketing managers. (Tr. 512, 529-30.) Finally, driver applicants are subject to a driving record/license check to ensure that applicants with spotty or unsafe driving records are not permitted to drive a Company truck, and drivers are also required to disclose any driving citations/restrictions they receive after their hire. (Tr. 532; RX-29.) Distributors are never subject to a driving record/license check, and they need not report any driving citations/restrictions at any time. (Tr. 533, 983.)

[36] TMT rents a 4,400-square-foot storage unit at a cost of $2,400 a month. (Tr. 590-91, 594.) BLM rents a storage unit at a cost of $390 per month. (Tr. 962). Mike-sell's neither instructed nor advised TMT and BLM about their chosen storage solutions. (Tr. 963.) In fact, BLM has exercised its right to change its storage solution without seeking permission from Mike-sell's. (Tr. 966).

[37] Mike-sell's recouped $18,000 from the warehouse- and truck-stored inventory that was sold along with the four routes. (Tr. 541.)

[38] Distributors are not required to rent hand-held scanners from Mike-sell's, and in fact, some distributors have chosen to buy their own. (Tr. 628.) Both BLM and TMT chose to rent hand-held scanners from the Company in order to avoid the hassle of purchasing their own scanners and syncing them to the Company's system. (Tr. 594, 628, 963.)

[39] TMT originally only purchased one route from Mike-sell's and entered into an Agreement at that time. (RX-1.) When TMT later purchased more Company routes, only the Agreement's Exhibit was updated because all other contractual terms remained the same. (Tr. 587; RX-16.)

III. LEGAL ARGUMENT

To establish an unlawful refusal to bargain or unilateral change under Section 8(a)(5), the General Counsel must show that "there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto without bargaining."[40] *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005) (emphasis added). To establish an unlawful failure to provide information under Section 8(a)(5), the General Counsel must show that Mike-sell's failed "to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative, including its grievance-processing duties."[41] *UPS, Inc.*, 362 NLRB No. 22 (Feb. 26, 2015). The General Counsel has not satisfied its burden of proof for either allegation, so the Complaint should be dismissed in its entirety.[42]

A. Mike-sell's Did Not Violate the Act by Refusing to Bargain Over the Sale of Routes.

The elimination of individual routes—like the closure of discrete business units—is not a mandatory subject of bargaining, so Mike-sell's was not required to bargain with the Union over its decision to sell the four routes at issue. Despite any collective bargaining relationship, and regardless of the existence of a labor contract, employers retain certain inherent rights to manage their businesses, unless and until such rights are expressly bargained away. For example, absent anti-union animus, an employer retains the inherent right to transfer and assign work;[43] maintain discipline;[44] promote

[40] As explained later herein, if the General Counsel satisfies this initial burden of proof, Mike-sell's may defend its unilateral action by showing that the Union "clearly and unmistakably waived its right to bargain over the change." *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005).

[41] The Complaint also alleges a violation of Section 8(a)(1) of the Act, which requires a showing that Mike-sell's engaged in conduct reasonably tending to "interfere with, restrain or coerce" employees in the free exercise of Section 7 rights. *See Dover Energy, Inc.*, 361 NLRB No. 48 (2014), *enf. denied on other grounds in Dover Energy, Inc. v. NLRB*, 818 F.3d 725, 729-30 (D.C. Cir. 2016); *American Freightways Co., Inc.*, 124 NLRB 146 (1959). Mike-sell's assumes this 8(a)(1) interference claim is derived from (and dependent upon) the 8(a)(5) claims because—apart from allegations about the sale of routes and the failure to provide information—the Complaint provides no support for a separate 8(a)(1) claim. (GC-1, ¶ 10.)

[42] The Union voluntarily withdrew its 8(a)(3) allegation as confirmed via letter from the Regional Director dated March 13, 2017. *Compare* GC-1(a) (including 8(a)(3) allegation) *and* GC-1(c) (including 8(a)(3) allegation) *with* GC-2 (excluding 8(a)(3) allegation).

[43] *NLRB v. Acme Indus. Prod., Inc.*, 439 F.2d 40, 41-43 (6th Cir. 1971) (absent anti-union animus, employer not required to bargain over decision to move production unit to another plant); *Macy's Missouri-Kansas Div. v. NLRB*, 389 F.2d 835, 840-41 (8th Cir. 1968) (recognizing "historical rights of an employer to transfer employees as efficiency demands" and "the inherent right of an employer to assign work to his employees," particularly in absence of anti-union animus).

[44] *NLRB v. Louisiana Mfg. Co.*, 374 F.2d 696, 706 (8th Cir. 1967) (denying reinstatement to discharged employee despite anti-union animus because supervisor "had a right . . . to oversee the employees . . . keep them operating efficiently . . . and appl[y] discipline where . . . necessary").

efficiency;[45] control production;[46] change operational procedures;[47] invest or withdrawal capital;[48] and sell or merge business units.[49] Indeed, the U.S. Supreme Court has confirmed that unilateral decisions about what lines of business to pursue—and what methods to use in pursuing them—are likewise among the inherent rights of any employer. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 677 (1981).

Contrary to the General Counsel's contention, this case is not governed by *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964), or *Dubuque Packing Co.*, 303 NLRB 386 (1991). The Company's sale of routes to distributors did not equate to subcontracting, such as in *Fibreboard*. 379 U.S. at 213-14. Nor did Mike-sell's relocate its distribution center and replace its drivers with other workers who fulfilled the same operational functions, such as in *Dubuque*.[50] 303 NLRB 386, 391. This case is instead far more analogous to *First National Maintenance*, *West Virginia Baking Co.*, 299 NLRB 306 (1990), and *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), as the situation extends beyond merely substituting "one set of employees for another."

1. This Case is Governed by First National Maintenance *and its progeny.*

In *First National Maintenance*, the issue was whether "an economically-motivated decision to shut down part of the business" was a mandatory subject of bargaining. *Id.* at 680. Two months after winning a certification election, the union gave notice of its desire to negotiate an initial contract. *Id.* at 669. The employer neither responded nor sought to consult with the union. *Id.* Then, two weeks later, the employer unilaterally cancelled a major services contract with a long-time customer, ignoring the

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[45] *Id.*

[46] *USW v. NLRB*, 243 F.2d 593, 596 (D.C. Cir. 1956), *rev'd in part on other grounds*, 357 U.S. 357 (1958) (finding that employer has "certain . . . inherent rights, such as the rights to production, to orderly conduct, and to cleanliness and order on his property").

[47] *NLRB v. Dixie Ohio Exp. Co.*, 409 F.2d 10, 10-11 (6th Cir. 1969) (absent anti-union animus, employer need not bargain over decision to "streamline the procedure of loading and unloading merchandise," despite resulting layoffs); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 111, 113 (8th Cir. 1965) (absent anti-union animus, decision to distribute through independent operators instead of employee-salesmen was not mandatory bargaining subject because it involved "basic operational change" and "partial liquidation and a recoup of capital investment").

[48] *Adams Dairy, Inc.*, 350 F.2d at 111.

[49] *NLRB v. Transmarine Nav. Corp.*, 380 F.2d 933, 938-39 (9th Cir. 1967) (absent anti-union animus, employer's termination of business and reinvestment of capital in different enterprise in another location was "[a] decision of such fundamental importance to the basic direction of the corporate enterprise" that it "is not included within the area of mandatory collective bargaining").

[50] The Board has held that "a decision to relocate unit work . . . is more closely analogous to the subcontracting decision found mandatory in *Fibreboard* than the partial closing decision found nonmandatory in *First National Maintenance*." *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991).

union's demand to bargain over the decision. *Id.* The High Court acknowledged that the decision to cancel the contract "had a direct impact" on the bargaining unit "since jobs were inexorably eliminated." *Id.* at 677. However, the decision "had as its focus only the economic profitability of the contract [with the customer], a concern . . . wholly apart from the employment relationship," so it "involv[ed] a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all." *Id.* The High Court aptly explained:

> A union's interest in participating in the decision to close a particular facility or part of an employer's operations springs from its legitimate concern over job security. . . . The union's practical purpose in participating, however, will be largely uniform: it will seek to delay or halt the closing. . . . It is unlikely . . . that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions. . . .There is an important difference, also, between permitted bargaining and mandated bargaining. Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose.

Id. at 681, 683. Despite absence of a labor agreement or contractual management rights clause, the employer's decision to cancel the services contract with its customer was still not a mandatory subject of bargaining. The U.S. Supreme Court balanced the parties' competing concerns and found that the employer's inherent managerial interest outweighed any potential impact on unit employees because "management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." *Id.* at 674.

Just as in *First National Maintenance*, the Company's sale of routes marked a fundamental change in its business model—a critical shift in the scope and direction of the enterprise—as to the four discrete territories eliminated.[51] (Tr. 306, 318, 320, 331, 340, 354, 364.) As the Paolucci Award recognized, by selling its routes to distributors, the Company "transfer[s] the expense and the potential revenue to a third party," thereby "removing the risk and reward from its purview." (Tr. 163-64, 259-60; RX-2, p. 17 (emphasis in original).) Hence, "[i]n losing control of the business [unit], and the business decisions, the Company has reduced its involvement to that of a supplier." (Tr. 163-64, 259-60; RX-2, p.

[51] Each individual route is tracked separately for sales volume and customer account purposes, so the elimination of each route is analogous to the liquidation of a separate business unit. (RX-14; RX-34.) The Company's overall goal is to increase profitability by freeing-up resources consumed by its route sales division and reallocating them to manufacturing and branding. (Tr.173, 244-45, 318, 340, 374, 549, 898.)

17.) Forcing Mike-sell's to bargain over the decision to discontinue routes, liquidate related assets, and reallocate its capital would cripple the Company's "freedom to manage its affairs." *Id.* at 677.

Both the Board (including Region 9) and the Circuit Courts have already found this precise decision—converting from drivers to distributors—to be a non-mandatory subject of bargaining. *See, e.g., W. Virginia Baking Co.*, 299 NLRB 306 at 307-16, 325 (1990) (finding decision to convert from driver-salesmen to distributors was not mandatory subject and citing NLRB Region 9 Dismissal Letter in Case 09-CA-023141, stating "employer's decision to discontinue its own distribution system and rely on independent distributors involved a fundamental change in the nature and direction of the employer's operations"); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965) (same); *see also Agencia De Publicaciones De Puerto Rico, Inc.*, 353 NLRB No. 68 at fn.9 (Dec. 24, 2008) (in light of *First Nat'l Maint.*, complaint failed to state claim by alleging "decision to sell . . . distribution rights [wa]s a mandatory subject of bargaining"); *Johnson's Indus. Caterers, Inc.*, 197 NLRB 352, 355 (1972) (assuming without deciding that "an employer is not required to bargain about a decision to change from an employee distribution system to a system of distribution by independent contractors").

In the strikingly-similar case of *Adams Dairy*, for example, the Eighth Circuit confirmed that an employer's decision to liquidate part of its business is <u>not</u> a mandatory subject of bargaining. There, a dairy decided to change its direct sales distribution system by selling product directly to distributors, who in turn would re-sell it to retail and wholesale outlets. *Id.* at 111; *see also Adams Dairy Co.*, 137 NLRB 815, 819 (1962), *enf. denied* (citing details of employer's business). The dairy's routes and trucks were sold to distributors as part of the conversion, and the only expectation was that distributors maintain sanitary facilities, high-quality product standards, and customer goodwill. *Id.* The sales territory purchased by distributors—though similar—did not perfectly mirror the routes and accounts formerly serviced by driver-salesmen. *Id.* In addition, the distributors took title to the product as soon as they received it, so the dairy had no legal concern for the product thereafter, as the distributors were responsible for re-selling it to recoup their investment. *Id.*

The Eighth Circuit distinguished the U.S. Supreme Court's opinion in *Fibreboard Paper*, where the decision to subcontract maintenance work "did not alter the [c]ompany's basic operation." 350 F.2d at 110 (citing 379 U.S. 203 (1964)). The Eighth Circuit agreed that, under *Fibreboard* circumstances,[52] "to require the employer to bargain . . . would not significantly abridge his freedom to manage the business." *Id.* at 111. But unlike the outsourcing in *Fibreboard*, the employer in *Adams Dairy* was not the primary beneficiary of the distribution work, as the dairy had no direct interest in whether distributors (as opposed to driver-salesmen) operated at a profit or loss. *Id.* Moreover, in *Adams Dairy*, the employer had already gradually sold ten routes, on a piecemeal basis, before its in-house distribution system was totally dismantled. *Id.* at 114. The Eighth Circuit thus found that the union "must have recognized" an entire system of distributors was possible—especially (but not exclusively) where the labor contract confirmed that "[n]othing . . . shall prevent Employer from enlarging, decreasing or altering the specified territory of any route nor . . . from putting on, splitting, rearranging, consolidating or eliminating any route . . . ." *Id.* at 114-15. The Eighth Circuit held that "the fact provision was made for the termination of a route should have, and probably did, put the union on notice" of the risk that all routes could be sold to distributors. *Id.* at 115.

Like the Eighth Circuit in *Adams Dairy*, the Board itself has also confirmed that "distributorship conversions . . . are nonmandatory subjects of bargaining because they involve a fundamental change in the nature and direction of the business." *W. Virginia Baking*, 299 NLRB 306, 313. In *West Virginia Baking*, for example, the Board adopted the decision of the Administrative Law Judge, holding that a company's decision to convert its driver-salesmen employees to independent distributors was not a mandatory subject of bargaining because:

- Most factors affecting distribution profit and loss were transferred to distributors. *Id*. at 314-15.
- Distributors set prices on product for most customers, except large chain accounts. *Id*. at 314.

[52] In *Fibreboard*, neither the employer nor the independent contractor made any capital investments or operational changes as part of the conversion. The employer merely replaced existing employees with an independent contractor's workers, who performed the very same work under similar conditions, but at a lower rate and with no fringe benefits. *Fibreboard Paper*, 379 U.S. 203 (1964).

- Distributors "made the final decision on ordering product, though [the company] still ha[d] input, and some control, especially with promotions arranged with large chain customers." *Id.* at 314. (Emphasis added).

- Distributors set their own work schedule and route. *Id.* at 314.

- Distributors could extend credit. *Id.* at 311, 314.

- Distributors could sell non-competitive product. *Id.* at 314.

- Distributors had to control stales and bore half the risk of loss for stales. *Id*. at 315-16.

- Distributors bore complete responsibility for their trucks. *Id.* at 310, 316.

- Distributors exercised substantial control over their operating expenses. *Id.*

- Distributors exercised substantial control over—and were free to negotiate—operating expenses, like fuel, insurance, truck repairs, warehouse space, accounting services, etc. *Id.* at 310, 315.

- Distributors purchased the right to distribute the company brands in a defined area. *Id.* at 316.

- Distributors were free to hire employees to assist in their business, and they were responsible for finding someone to service their territory in the event they could not service it. *Id.* at 311, 315.

- The company had exercised control over driver-salesmen employees with regard to personal appearance, truck cleanliness, route order, product ordering, and day-to-day job performance. But with few exceptions, the company could only make recommendations to distributors, who were free to accept or reject them. *Id.* at 315.

- Title to the product passed to distributors at dockside, and the company legally had no concern or control over what they did with the product. *Id.* at 315.

- Distributors could choose how they disposed of their product. *Id.* at 316.

- The company suggested financing the trucks through Wachovia Bank, and the company financed the sales territories itself. The sale and financing of the trucks and territories appeared to be arm's-length transactions with interest involved, and the distributors were free to find different financing, if they chose to do so. *Id*. at 316.

- The company was motivated to change its business model in order to recoup capital resources and reallocate them from distribution to production. *Id.* at 308-09, 313-14, 316.

Together, *Adams Dairy* and *West Virginia Baking* set forth the industry-specific framework for the *First National Maintenance* analysis necessary to this case.

2. The Company's Relationship with its Distributors Falls Squarely Within West Virginia Baking *and* Adams Dairy.

Although the Agreement sets forth the initial relationship between distributors and Mike-sell's, the testimony clearly established that these relationships develop and evolve over time, sometimes in ways contrary to the contractual language. (Tr. 569, 597-98, 987, 569, 980; RX-1; RX-16.) The relationship between Mike-sell's and its distributors is materially different from the relationship between Mike-sell's and its drivers. Most differences between distributors and drivers were noted during the hearing, the most pertinent of which can efficiently be summarized in the following table:

Differences in Relationship	Route Sales Drivers	Independent Distributors
Guaranteed salary/Assumes risk of loss	Yes (Tr. 132-34, 213-18, 720-21, 949, 951)[53]	No (Tr. 556-57, 596, 669, 970-71)[54]
Buys product outright	No (Tr. 202-03, 556, 596, 602)	Yes (Tr. 602, 970-71)
Required to work pre-set days/hours	Yes (Tr. 135, 563-64, 953)	No (Tr. 563-64, 606, 974)
Must return to Mike-sell's by set time	Yes (Tr. 135, 953)	No (Tr. 563-64, 606, 974)
May distribute competing products	No (Tr. 954)	Yes (Tr. 597-98, 987)
Own their trucks and pay related costs	No (Tr. 132-33, 202-03, 949)	Yes (Tr. 487, 488, 508, 509, 962, 965.)
Mike-sell's covers for days off	Yes (Tr. 190, 565, 952)	No (Tr. 565, 607, 976)
May hire own employees/contractors	No (Tr. 202-03, 565, 952)	Yes (Tr. 566, 606, 965)[55]
Chooses and pays for warehouse space	No (Tr. 202-03)	Yes (Tr. 597, 962; JX-12; RX-16)[56]
Subject to drug testing	Yes (Tr. 202-03, 529, 532, 982; RX-31)	No (Tr. 537, 983)
Limited to 55 hours / week	Yes (Tr. 258)	No (Tr. 563-64, 606, 974)
Subject to workplace rules / discipline	Yes (Tr. 559, 567; RX-29)	No (Tr. 559, 593, 968)
Decide type/amount of product	No (Tr. 562, 947)	Yes (Tr. 563, 602, 970)
Must use Company displays	Yes (Tr. 949)	No (Tr. 604, 972; JX-12, § 10.)
Subject to appearance standards	Yes (Tr. 950)	No (Tr. 596-97, 983-84)[57]
May carry non-employees in truck	No (Tr. 978)	Yes (Tr. 979)
Can refuse to service customers	No (Tr. 969)	Yes (Tr. 598-99, 625-26, 967-68)[58]
Subject to physical examination	Yes (Tr. 538, 982-83)	No (Tr. 538, 983)
Subject to driving record/license check	Yes (Tr. 202-03, 532-33, 558-60, 982)	No (Tr. 533, 561, 983)
Subject to criminal background check	Yes (Tr. 529, 981-83)	No (Tr. 529)
Required to be corporate entity	No (Tr. 533)	Yes (Tr. 533)
Completes employment application	Yes (Tr. 529, 531, RX-25)	No (Tr. 529)
Subject to credit check/asset inventory	No (Tr. 203, 533-34)	Yes (Tr. 513-15; RX-21; RX-22; RX-23)
Can re-sell routes to other distributors	No (Tr. 202, 952)	Yes (Tr. 569, 980)
Can change promotions/prices/billing	No (Tr. 569-70, 949)	Yes (Tr. 570, 603-10, 972, 990-91)[59]
Must keep specific paperwork	Yes (Tr. 71, 103, 947-48, 950)	No (Tr. 606)

[53] Drivers testified inconsistently about "stales," first claiming their wages were "reduced" for stales but later admitting Mike-sell's essentially gave them an "advance" on all product delivered, assuming it would sell. (Tr. 133-34, 213-14, 216.) The "stale reduction" was just a return of the advance already received, thus bringing their final pay in line with actual sales, as corroborated by Krupp, a former driver. (Tr. 134, 213-14, 216, 948-49.)

[54] Indeed, there are weeks when distributors do not make any money at all (and instead sustain business losses) because they order too much or too little product, and/or do not price the product at a profitable level. (Tr. 604-05, 669-70, 972.) On other occasions, after taking ownership of the product, distributors have at times donated cases of product to a local soup kitchen. (Tr. 971.)

[55] TMT contracts with 12 independent operators, and Krupp has one full-time employee. (Tr. 606, 965.)

[56] BLM has exercised its right to change its storage solution without seeking permission from Mike-sell's. (Tr. 966).

[57] During her time as a Company driver, Krupp was subject to specific appearance standards that no longer applied to her as a distributor. (Tr. 950.)

[58] Distributors can, and have, refused to service certain customers without consequence. (Tr. 598-99, 625-26, 967-68.)

[59] Mike-sell's neither advertises for distributors nor requires them to follow Company promotions. (Tr. 603, 972.) Other than chain accounts, distributors have discretion to change pricing on all products. (Tr. 570; JX-12, § 3; RX-16, § 3.) Even with chains, there is only a max price—distributors could charge less if they wanted. (Tr. 570.) Both TMT and BLM have raised and lowered prices from those set by Mike-sell's. (Tr. 608, 990-91.) Also, distributors can, and have, changed the manner in which customers are billed and/or extended credit to customers. (Tr. 609-10.)

The above-referenced factors clearly demonstrate that Mike-sell's distributors are truly independent entrepreneurs, differing in all material respects from Company drivers. In fact, Mike-sell's distributors exercise even more independent discretion and control over their businesses than the distributors in *West Virginia Baking* and *Adams Dairy*, as shown by the following distinctions:

- Mike-sell's distributors have complete discretion to raise or lower product prices for most clients, and they also retain discretion to lower product prices for large chain customers. (Tr. 570, 608, 990-91; JX-12, § 3; RX-16, § 3.) *Compare W. Virginia Baking*, 299 NLRB at 314 (noting the company retained the right to set all product prices for large chain accounts).

- Mike-sell's distributors have complete discretion as to the type and amount of product they purchase, without input form Mike-sell's. *Compare Id.* at 314 (noting distributors "made the final decision on ordering product, though [the company] still ha[d] input, and some control, especially with promotions arranged with large chain customers").

- Mike-sell's distributors can, and do, sell competitive product in the same territories where they sell Mike-sell's product. For example, TMT sells products for Snyder-Lance, Grippo, and Hussman in the same stores where TMT sells Mike-sell's product. (Tr. 598.) *Compare Id.* at 314 (noting that distributors could sell only non-competitive product).

- Mike-sell's distributors bear the full risk of loss on all stale product. *Compare Id.* at 315-16 (noting that distributors only bore half the risk of loss for stales).

- Mike-sell's distributors have no performance standards whatsoever beyond storing product in a sanitary location. (Tr. 559, 596-97, 593, 968, 983-84; RX-16.) *Compare Adams Dairy*, 350 F.2d at 111 (noting that distributors must maintain "high product standards" and "good will").

There simply can be no question that, under controlling precedent from the U.S. Supreme Court, the Board itself, and the Circuit Courts, Mike-sell's changed its basic operations for four individual routes historically run by drivers, essentially selling off the separate business units that handled distribution for those areas. (Tr. 306, 318, 320, 331, 340, 354, 364.) This strategic shift in the scope and direction of the Company's distribution model resulted in the partial liquidation of capital, new revenue streams, annual cost savings, reallocation of assets and resources, and increased lines of credit. (Tr.539-46, 548-49.) This arrangement basically reversed the order in which Mike-sell's realizes revenue by selling product up-front and retaining no legal interest in it, thereby transferring the entire risk of loss to the distributor. (Tr. 245, 557.) The Company's recouped capital and newfound revenue was, in turn, reinvested in core manufacturing and branding initiatives, two activities at the heart of the

business. (Tr. 173, 244-45, 318, 340, 374, 549-53, 898; RX-27; RX-28.) To require bargaining over the decision to close individual business units and/or redistribute assets and capital would greatly abridge the Company's freedom to manage its enterprise. *Adams Dairy*, 350 F. 2d at 111. Accordingly, the sale of routes to the independent distributors was not a mandatory subject of bargaining.

3. Mike-sell's made no "material, substantial, and significant change" to drivers' terms and conditions of employment.

Assuming *arguendo* that the sale of routes was a mandatory bargaining subject, the General Counsel must still prove that the unilateral sale of routes in 2016 was "a material, substantial, and significant change" to drivers' terms and conditions of employment. *See, e.g., The Bohemian Club*, 351 NLRB 1065, 1066 (2007). The Sixth Circuit has confirmed that, "if an employer has frequently engaged in a pattern of unilateral change . . . during the term of the CBA, then such a pattern of unilateral change becomes a 'term and condition of employment,' and that a similar unilateral change after the termination of CBA is permissible to maintain the *status quo*." *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002). Thus, "it is the actual past practice of unilateral activity . . . and not the existence of the management-rights clause . . . that allows the employer's past practice of unilateral change to survive the termination of the contract." *Id.*

The General Counsel cannot show that Mike-sell's unilaterally changed any of the drivers' working conditions. After all, the Company sold and re-sold over four dozen driver-run routes during the seven-year period preceding the route eliminations at issue.[60] (Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2, pp. 7-8; RX-5; RX-6; RX-7; RX-8; RX-9.) Three dozen routes were sold for the very first time after the end of the Expired Contract term. (Tr. 303-04; RX-1; RX-5; RX-6; RX-7; RX-9.) While the Union received advanced notice of these post-expiration sales, it neither demanded to bargain nor filed a grievance or unfair labor practice charge to challenge them. (Tr. 303, 305-06, 308, 321, 330,

[60] The General Counsel may claim the Union received no notice of routes that were resold to other distributors after being returned by their initial purchaser, but any such suggestion would conflict with the Regional Director's own Petition, which admitted that "[o]n at least a few occasions, independent distributors have returned routes to respondent." *NLRB v. Mike-sell's Potato Chip Co.*, No. 3:17-CV-126, ECF 1-1, pp. 8, 15. Such a suggestion would also be contrary to the record evidence, which demonstrates that at least the Union Steward was aware of the resales. (Tr. 137, 175, 327-29, 355-57, 373.)

332, 346, 357, 360.) As to the four sales the Union eventually challenged, no drivers were laid off.[61] (Tr. 113, 182, 248-49, 377, 408.) Because the routes were sold pursuant to a longstanding practice, the sales reflected a continuation of the *status quo* rather than a unilateral change in violation of the Act. *See, e.g.*, *Bohemian Club*, 351 NLRB at 1066; *George R. Klein News Co.*, 306 NLRB 118, 136 (1992).

The General Counsel will undoubtedly rely on a recent Board decision holding that "unilateral, postexpiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause." *E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op. at *3-4 (Aug. 26, 2016). This administrative parlance conflicts not only with the aforementioned Sixth Circuit law, but also with prior Board decisions and other Circuit Court rulings. *See, e.g.*, *Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319 (2006); *Courier-Journal I*, 342 NLRB 1093 (2004) and *Courier-Journal II*, 342 NLRB 1148 (2004); *Capitol Ford*, 343 NLRB 1058 (2004); *Westinghouse Elec. Corp.*, 150 NLRB 1574 (1965); *Shell Oil Co.*, 149 NLRB 283 (1964); *see also E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).

Moreover, the 2016 decision in *Du Pont* is also highly distinguishable on its facts. For example, in *Du Pont*, the employer and the union were actively engaged in ongoing negotiations for successor agreements at two facilities, and it was undisputed that the parties had not reached a good faith impasse. *Du Pont*, 364 NLRB No. 113, slip op. at *2, 13-14, 17. Also, the *Du Pont* union promptly challenged every alleged unilateral change made after the labor agreements expired. *Id.* at *2. In addition, *Du Pont* addressed only the post-contract-expiration viability of "a practice of making the same discretionary unilateral changes . . . pursuant to a management rights clause." *Id.* at *16 (emphasis added).

Here, unlike the ongoing bargaining in *Du Pont*, the parties have not met for contract negotiations since June 2014, despite the Company's production of requested financial information and repeated invitations to resume contract talks. (Tr. 261-62, 475-83, 882-92; RX-15; RX-40; RX-42.) Nor did the Union promptly challenge the Company's alleged unilateral action, raising no objection to

[61] Even the Regional Director's Petition referred to the sale of these four routes as "a marginal change" involving "a small portion of [Company] equipment." *Mike-sell's*, No. 3:17-CV-126, ECF 1-1, pp. 8, 15.

the sale of more than three dozen routes after the end of the Expired Contract. (Tr. Tr. 303-04, 317, 330-31, 336-38, 350.) But perhaps most important, it is undisputed that the Management Rights Article of the Expired Contract is not what empowered Mike-sell's to eliminate routes in the first place.[62] The ability to eliminate routes has always been an inherent right of the Company that was merely recognized by the Route Bidding Article of the Expired Agreement (and Revised Final Offer). (RX-2, p. 20.)

Rather than *Du Pont* then, this case is much more analogous to *Adams Dairy*, where "the union must have recognized that an entire system of independent [distributors] was a possible alternative," especially since "the . . . contract itself provided the procedures to be taken in the event route or routes were to be discontinued or eliminated." 350 F.2d at 114-15. Like the *Adams Dairy* opinion, the Paolucci Award suggests the Union "must have recognized" the sale of more routes was possible, particularly given that the Route Bidding Article expressly confirms (and does not restrict) the Company's right to eliminate routes. (JX-1, pp. 16-17; RX-2, pp. 20-21; RX-3, p. 9.) The Route Bidding Article is separate from—and unrelated to—the Management Rights Article. (*Compare* JX-1, pp. 16-17 *and* RX-3, p. 9 *with* JX-1, p. 30 *and* RX-3, p. 18, respectively.) It is inappropriate to treat two distinct Articles the same when they address different topics and are intended for the benefit of opposite parties.[63] Discrete contract provisions containing context-dependent rights must be analyzed independently from (and less critically than) broad management rights clauses that purport to "give the employer the world." *See, e.g., Walt Disney World Co.,* 359 NLRB 648, 652-53 (2013) (analyzing limited reservation of rights as to staffing for catering functions separately from broad management rights clause granting authority to select number and identity of employees assigned to particular job

[62] In its Petition, the Regional Director repeatedly concedes that the Paolucci award "did not determine . . . the union had waived its right to protest such sales under the Managements Rights Clause;" that "the Route Bidding procedure does not speak to [the Company's] prerogative to sell the routes, but merely addresses one effect of such change;" and that "the arbitrator only concluded that the contract did not prohibit [Mike-sell's] from selling the routes as opposed to giving it the privilege to do so." *Mike-sell's*, No. 3:17-CV-126, ECF 1-1, pp. 4, 10. The Union has likewise admitted, in its 2012 post-arbitration brief, that the Management Rights Article does not govern or permit the sale of routes and that Mike-sell's "went outside the provisions of the [Expired Contract]" when it sold Angie Watson's route. (RX-43, pp. 8-10 (emphasis added).) The Union will undoubtedly emphasize that Mike-sell's argued in its own 2012 post-arbitration brief that the Management Rights Article of the Expired Contract was indeed applicable. (CP-1.) But the bottom line is, the Union was right—and the Company was wrong—in that Arbitrator Paolucci did not rely on the Management Rights Article in issuing his award. (RX-2, pp. 16-21.)

[63] That is, the Route Bidding Article mainly benefits the Union, whereas the Management Rights Article mainly benefits the Company.

classifications, and finding neither provision permitted elimination of job classifications); *Gratiot Cmty. Hosp.*, 312 NLRB 1075, 1084-85 (1993) (finding that more limited reservation of rights provision—permitting employer to determine number of shifts—allowed employer to unilaterally eliminate special shift program, despite finding that managements rights clause was too broad to confer such discretion). Thus, as in *Adams Dairy*, "the fact provision was made for the termination of a route [in the Route Bidding Article] should have, and probably did, put the union on notice" of the risk that Mike-sell's may choose to further reduce its Company route sales division by selling individual business units and reallocating its assets to manufacturing and branding. *See* 350 F.2d at 115.

In short, the Company's unilateral decision to sell the four routes at issue was consistent with the parties' past practice, the Expired Contract, the Revised Final Offer, the Paolucci Award (which the Union never sought to vacate), and controlling law.[64] *Wp Co., LLC*, 358 NLRB 318, 323-24 (2012) (affirming ALJ Decision at JD-70-11, 2011 WL 5562019 (Nov. 15, 2011), that employer did not violate Act where it had "longstanding practice" of unilateral changes such that further unilateral action of same ilk was "continuation of the *status quo*"). Thus, Mike-sell's implemented no "material, substantial, and significant change" to mandatory bargaining subjects.

4. Even if Mike-sell's did materially change the* status quo *by eliminating the four routes at issue, the Union waived its right to bargain over those decisions.

A party may relinquish bargaining rights through a "clear and unmistakable" waiver. *See, e.g.*, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Waiver may be established "by express

[64] The Regional Director has long insisted the Expired Contract should still be in effect today, as evidenced by its compliance position in pending Board Case No. 09-CA-094143. Mike-sell's disagrees with the Regional Director and believes the Expired Contract was only required to remain in effect through June 12, 2013, after which the Company was privileged to lawfully implement its Revised Final Offer (including its Route Bidding and Management Rights Articles) based on the parties' good faith bargaining impasse. *See, e.g., George R. Klein News Co.*, 306 NLRB 118, 136 (1992) ("an employer's obligation to comply and give effect to . . . a collective-bargaining agreement continues after the agreement expires, until the employer has fulfilled, or been relieved of its duty to bargain about changing the existing terms . . . as, e.g., where the parties have bargained to impasse, and the changes thereafter made are consistent with any bargaining proposal previously advanced by the employer . . . or, where . . . the union had effectively waived its right to bargain on the subject matter subsequently changed"); *Wp Co., LLC*, 358 NLRB 318, 323-24 (2012) (where good faith impasse existed, employer was privileged to continue past practice of unilaterally assigning non-unit employees to perform unit work without bargaining, where unilateral work assignments were consistent with terms of parties' tentative agreement). As a practical matter, regardless of whether the Expired Contract or the Revised Final Offer is found to have been in place when the four routes were sold in 2016, the Paolucci Award and applicable law applies equally to both sets of terms because their Route Bidding Articles contain substantively indistinct route elimination provisions. (JX-1, pp. 16-17; RX-3, p. 9.) Nevertheless, it is absurd and hypocritical for the Regional Director to advocate for reimplementation of the Expired Contract as to Board Case No. 09-CA-094143, while completely ignoring the Route Bidding Article of that same Expired Contract for purposes of Board Case No. 09-CA-184215, particularly (though not exclusively) where the facts are so highly distinguishable from those in *E.I. Du Pont De Nemours*, 364 NLRB No. 113 (Aug. 26, 2016).

provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two." *Am. Diamond Tool, Inc.*, 306 NLRB 570, 570-71 (1992) (internal citations omitted); *see also Gratiot Cmty. Hosp.*, 312 NLRB 1075, 1084-85. For example, a union waives its bargaining rights "if it receives advance notice of a proposed change and fails to request bargaining." *The Bohemian Club*, 351 NLRB at 1067. Waiver will also occur if no contract is in effect, the union has the chance to request bargaining over a mandatory subject but fails to do so, and further acknowledges the possibility for the same kind of unilateral action in the future by proposing contract language about it. *Diamond Tool*, 306 NLRB at 570-71.

Here, the Union engaged in a course of conduct that clearly and unmistakably waived any purported right to bargain over the decision to sell routes. First, the Union silently accepted the unilateral sale of over four dozen routes between 2009 and 2016—with more than three dozen sales occurring after the term of the Expired Contract. (Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2, pp. 7-8; RX-5; RX-6; RX-7; RX-8; RX-9.) The Union's historical acquiescence in the sale of routes, and its consistent failure to request bargaining, is simply inexcusable. *See, e.g., Post-Tribune Co.*, 337 NLRB No. 192, 1280 (2002) (while a union's prior acquiescence does not operate as an automatic waiver of its right to bargain, where the past practice at issue has occurred with such regularity and frequency that it has become the status quo, a clear and unmistakable waiver will be found.)

Second, despite its dismay with the Paolucci Award, the Union proposed keeping the same language in the Route Bidding Article that Arbitrator Paolucci had already found to support the Company's inherent right to sell routes, a proposal on which the parties' ultimately reached tentative agreement.[65] (Tr. 274-75.) The deference accorded an arbitrator in interpreting labor contracts is firmly established as a matter of federal policy. That is, "interpretation of the collective bargaining agreement is a question for the arbitrator," as "[i]t is the arbitrator's construction which was bargained for."

[65] Mike-sell's initially sought to clarify the Route Bidding Article to incorporate the Paolucci Award, so it would be clear that the same bumping rights apply equally whether a route is completely abandoned and or just sold. (Tr. 263-64.) Based on the Union's representation that no clarification was needed, the parties eventually reached a tentative agreement to keep the same operative language in the Route Bidding Article, although not until after the Revised Final Offer was unilaterally implemented in June 2013. (Tr. 274-75; RX-4, p. R00487 at ¶ 3 (reflecting prior "TA").)

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960); *Olin Corp.*, 268 NLRB 573, 576 (1984) ("An arbitrator's interpretation of the contract is what the parties here have bargained for and, we might add, what national labor policy promotes"). Thus, the Union's proposal to maintain the very same contract language that it believed Arbitrator Paolucci interpreted in an unfavorable manner essentially served as acquiescence regarding how that language would be applied in the future.

Third, while the Union filed a grievance claiming various violations of the Expired Contract, the Union failed to actually demand bargaining when Mike-sell's announced the potential sale of routes in April 2016. (Tr. 376-77, 780-81; JX-4.) Even after receiving written notice of the actual sale of Route 102 in July 2016, the Union still never asked to bargain over that decision or filed a grievance to challenge it. (Tr. 376-77.)

Fourth, in November 2016, the Union proposed—for the first time—the following new language for the Management Rights Article: "Notwithstanding anything contained in this Agreement to the contrary, the Company shall not sell, transfer, or otherwise assign any current routes, in one transaction or a series of transactions, to any other person or entity without the agreement of the Union." (RX-4, p. R00490.) Prior to this proposal, the Union had always asked that the Management Rights Article remain unchanged.[66] (Tr. 287-88, 293-94.) This newly-proposed contract language only served to further confirm the Union's understanding that Mike-sell's did, in fact, have the right to "sell, transfer, or otherwise assign" routes to distributors, which (as the Paolucci Award recognized) could only be extinguished by "clear contract language." (RX-2, p. 20.)

All of these undisputed facts make it abundantly clear that the Union knowingly and unmistakably waived its right to bargain over the sale of routes.

5. Even if Dubuque *were applicable (instead of* First National Maintenance *and its progeny), the General Counsel still cannot meet its burden of proof.*

[66] Again, it is undisputed that the Management Rights Article of the Expired Contract is not what empowered Mike-sell's to eliminate routes in the first place. The Regional Director's Petition repeatedly conceded this fact. *Mike-sell's*, No. 3:17-CV-126, ECF 1-1, pp. 4, 10. The Union's 2012 post-arbitration brief made similar admissions. (RX-43, pp. 8-10.)

The General Counsel undoubtedly relies on the burden-shifting test in *Dubuque Packing Co.*, 303 NLRB 386 (1991), which was developed to analyze "whether a decision to relocate unit work is a mandatory subject of bargaining." *Id.* at 390. Under the *Dubuque Packing* test, the General Counsel must first prove "that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation." *Dubuque Packing*, 303 N.L.R.B. at 391. If the General Counsel successfully establishes a *prima facie* case, the burden shifts to the employer to show (1) "the work performed at the new location varies significantly from the work performed at the former plant;" (2) "the work performed at the former plant is to be discontinued entirely and not moved to the new location;" or (3) "the employer's decision involves a change in the scope or direction of the enterprise." *Id.* Alternatively, the employer may show that either (1) "labor costs . . . were not a factor in the decision," or (2) even if they were a factor, "the union could not have offered labor cost concessions that could have changed the employer's decision to relocate." *Id.*

The General Counsel cannot make a *prima facie* case under *Dubuque* because Mike-sell's did not "relocate" any unit work that the Company continues to perform elsewhere. It is undisputed that Mike-sell's stopped performing distribution work for the four routes altogether. (Tr. 485.) It is also undisputed that Routes 102, 104, 122, and 131 were discrete, driver-serviced territories prior to 2016, having never been sold to distributors before. (Tr. 374-76, 381-82, 390-91, 406.) The sale of these routes thus undeniably affected "a basic change in the nature of the operation," as Mike-sell's no longer serviced the territories and no longer directly felt the risk of loss or the reward of success based on their sales volume. (Tr. 556-57, 596, 970-71; RX-2, pp. 16-17.) In sum, it is clear the General Counsel cannot satisfy either threshold element under *Dubuque*.

Assuming a *prima facie* case is made, Mike-sell's can easily establish all the *Dubuque* defenses—much less the single defense required. First, Mike-sell's has detailed how the expectations and responsibilities of distributors "var[y] significantly" from those of drivers. *See* Legal Argument - Section III(A)(1-2), *supra*. Second, all distribution work that Mike-sell's formerly performed on the

routes was "discontinued entirely and not moved to [any] new location" of the Company. (Tr. 374-76, 381-82, 390-91, 406, 485.) Third, the sale of driver-run territory did indeed "involv[e] a change in the scope or direction of the enterprise" for those discrete business units affected, as well as ongoing implementation of a new corporate business model that began years earlier. (Tr. 244-47.) Fourth, Mike-sell's presented unequivocal evidence that "labor costs . . . were not a factor in the decision" to sell the four routes, as the Company simply wants to minimize its distribution business in order to maximize its manufacturing business. (Tr. 306, 318, 320, 331, 340, 355, 364.) Achievement of this goal clearly does not hinge on labor costs,[67] as Mike-sell's pays more in distributor margins than in driver wages/benefits for the same sales volume. (Tr. 540.) Fifth, Mike-sell's presented unrebutted evidence that the Union "could not have offered labor cost concessions that could have changed the [Company]'s decision to [sell the routes]." (Tr. 892-93, 898-99.)

The General Counsel and the Union baselessly contend Mike-sell's sold routes primarily to save on labor costs, as well as to improve individual route profitability.[68] (Tr. 38-39, 40, 169-70, 418, 422, 460-63, 935-36, 939.) There is simply no evidence to support these hypotheses, as the record literally defies them. That is, the unrebutted evidence reflects that Mike-sell's did not consider individual route profitability in determining which routes to sell, nor did labor costs motivate the sale of any routes. (Tr. 305-06, 319-20, 331, 340, 355, 360, 365, 370, 374, 540, 897-899.) Hence, even under the *Dubuque* test, the sale of routes is not a mandatory subject of bargaining.

B. Mike-sell's Did Not Violate the Act By Declining to Produce Information in Response to the Union's August 31st Information Request.

Employers are only required to produce that information needed by the Union to fulfill its statutory obligations. *See, e.g., Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985); *North*

[67] The mere fact that labor costs comprised a fair share of the Company's route sales division operating expenses does not prove that Mike-sell's did not have a more important, strategic reasons for selling its routes. As the Fourth Circuit wisely explained in *Dorsey Trailers, Inc. v. NLRB*, "*Dubuque Packing* posits a false dichotomy between economic and labor costs." 233 F.3d 831, 844 (4th Cir. 2000). That is, economic reasons are not—and need not be—completely "distinct and apart from a desire to decrease labor costs." *Id.* (citing *Arrow Automotive Indus. v. NLRB*, 853 F.2d 223, 228 (4th Cir.1988)). Indeed, labor costs are "inescapably" a part of the economic calculus that any employer must consider in deciding whether to change its operation or business model. *Id.*

[68] The Union objected to the sale of Routes 102, 104, 122, and 131 based on a belief that these particular routes were "profitable" and had "high sales volume." (Tr. 38-39, 40, 169-70, 418, 422, 460-63, 935-36, 939.) But "profitability" is not the same as "sales volume," and the evidence reflects that three of the four routes sold had suffered huge losses, while the final route made a meager $61. (Tr. 411-12, 424-25, 470-74.)

Bay Center, 287 NLRB 1223, fn.1 (1988). Unions cannot force employers to negotiate over non-mandatory subjects of bargaining, so they clearly have no statutory duty to bargain over such subjects—which in turn means they cannot justify information requests by asserting the data is needed to fulfill their statutory obligations. *See, e.g., Pieper Elec., Inc.*, 339 NLRB 1232 (2003) (no duty to furnish information sought in connection with non-mandatory subject); *In re California Pac. Med. Ctr.*, 337 NLRB 910, 914 (2002) (same); *Service Employees Local 535*, 287 NLRB 1223, fn. 1 (1988) (same).

Mike-sell's had the right to decline to respond to the Union's August 31st information request, which was made for the specific purpose of bargaining over the Company's decision to eliminate routes. (Tr. 156, 405, 474-75, 462, 782; JX-8.) As discussed above, the decision to sell individual routes to reflects a fundamental change in the scope and direction of the Company's enterprise—akin to closing discrete, stand-alone business units—which is not a mandatory subject of bargaining.[69] *See, e.g.*, *First Nat'l Maint.*, 452 U.S. at 684. Because the decision to sell routes is not a mandatory bargaining subject (and/or the Union waived its right to bargain), Mike-sell's need not produce information requested by the Union for the specific purpose of decisional bargaining.

C. The Union's Second Amendment Fails on Both Procedural and Substantive Grounds, so the Related Amended Complaint Allegations Must be Dismissed.

The Union waited until May 31, 2017—immediately before the hearing in this matter—to amend Charge No. 09-CA-184215 for a second time, adding the following vague allegation regarding the sale of the routes trucks: "Since on or about September 2016, and continuing to the present date, the above-named Employer made unilateral changes in terms and conditions of employment by entering into contracts for owner operator equipment in violation of Section 8(a)(5) of the Act." (GC-2.) This amendment fails to specify whether the alleged violation relates to the Company's sale of equipment to

[69] Again, while Mike-sell's started out distributing its own products, the Company's core initiative has always been to manufacture and sell quality snack foods. (Tr. 173, 244-45, 318, 340, 374, 549-53, 898; RX-27; RX-28.) Mike-sell's is not in the delivery business, and it makes no sense for the Company to continue funding a losing endeavor. (RX-2, p. 18 (recognizing the absurdity of "a situation where [the Company] would be forced, by contract, to continue a business activity that loses money every day").) It is common industry practice for snack food manufacturers to sell their routes to distributors. *See Mrs. Baird's Bakery*, 117 LA at 1054 (recognizing that "[u]sing Independent Distributors has been a growing trend"). In fact, there are national route brokers whose sole purpose is to assist businesses in buying and selling geographic sales territories from manufacturers who no longer want to service them directly. *See, e.g.*, http://www.mrrouteinc.com (visited 7/7/2017); http://www.routesforsale.net (visited 7/7/2017); http://www.routebrokers.com (visited 7/7/2017).

distributors (i.e., the trucks) in September and October 2016, or to the Company's execution of contractual agreements with distributors (i.e., the Agreements) in July and September 2016. (RX-1; RX-10; RX-11; RX-12; RX-16; RX-17; JX-12.)

This confusion was exacerbated during the hearing when the Union's counsel argued that the Second Amendment was supported by the same evidence underlying original Charge No. 09-CA-184215, as follows:

> As I indicated in an off-the-record discussion, Your Honor, the evidence is all tied in together. It will not be independent evidence in order to support the second amended charge. The evidence will all be the same evidence from our perspective, but the concept of a unilateral change unrelated to an obligation to bargain those decisions is the differentiation between the S1 new paragraph and the second amended charge.
>
> I didn't want to take the chance that that would not be part of the case when it was the original charge and the first amended charge, unilateral change had specifically to do with the failure to bargain over the decision. I wanted to make sure it would be separated so that it could be heard in and of itself as an aspect of this case.

(Tr. 23-24 (emphasis added).)

The Union's own words, however, highlight the differences between the two allegations and call into question the ability to proceed on the Second Amendment without independent evidence, as the original Charge No. 09-CA-184215 and first charge amendment relate to a failure to bargain while the Second Amendment relates to "a unilateral change unrelated to an obligation to bargain." (Tr. 23 (emphasis added).) Although the Union offered no explanation, testimony, or independent evidence regarding the supposed "unilateral change," presumably it relates to Article XIV of the Expired Contract, entitled "Owner-Driver Equipment," which provides:

> The Company agrees that it will not employ or contract for owner-driver equipment, and that the Company shall not rent, lease or sub-lease equipment to members of the Union or any other individual, firm, corporation or partnership which has the effect of defeating the terms and provisions of the [Expired Contract].

(JX-1, p. 21.)

As stated above, when Mike-sell's sold the four routes at issue in 2016, both TMT and BLM opted to purchase trucks from the Company to service those routes. (Tr. 507, 509; RX-17.) The Union

was clearly aware that Company trucks were sold to distributors in connection with the sale of routes. Indeed, in August 2016, Route Sales Driver Jerry Schimer expressly told Union Steward Richard Vance that his truck was being sold to one of the distributors who had purchased the routes in question. (Tr. 114-15.) Vance even watched Schimer remove his belongings from the truck to which he was formerly assigned and put them into another truck. (Tr. 115.)

Nonetheless, the Union's first amended Charge No. 09-CA-184215 contained only the following Section 8(a)(5) allegations:

> On or about September 4, 2016 and September 12, 2016, and continuing to the present date, the above-named Employer made unilateral changes in terms and conditions of employment by selling delivery routes Nos. 102, 104, 122, and 131 allegedly to another entity without meeting and bargaining with Teamsters Local Union No. 957 over the decision to sell such routes, and as a result, eliminating bargaining unit work, in violation of Section 8(a)(5) of the Act.
>
> On or about September 12, 2016 and continuing to the present date, the above-named Employer has failed and refused to provide information to Teamsters Local Union No. 957 requested regarding the financial basis reason for the alleged sale of the routes to allegedly another entity, and for not providing requested financial information relevant and necessary for negotiations over the decision to sell of delivery routes in violation of Section 8(a)(5) of the Act.

(GC-1(a), p. 2; GC-1(c), p. 2.)

Not only did the Union offer no testimony or evidence regarding the alleged unilateral change under Article XIV of the Expired Contract, or how the sale of unneeded Company equipment defeated "the terms and provisions of the [Expired Contract]," but the Union also offered no justification for its decision to wait nearly nine months after the sale of the trucks (and only minutes before the Hearing began) to file the Second Amendment.

1. The Second Amendment is Untimely.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). The 10(b) time limitation begins to run when the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Vanguard Fire &*

Security Systems, 345 NLRB 1016, 1016 (2005). "A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence." *Ohio & Vicinity Regional Council of Carpenters*, 344 NLRB 366, 368 (2005) (citing *Phoenix Transit System*, 335 NLRB 1263 fn. 2 (2001)) (applying Section 10(b) where a charging party was found to have been "on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred."); *see also St. Barnabas Medical Center*, 343 N.L.R.B. 1125, 1127 (2004) (finding that knowledge is imputed when a party first has "knowledge of the facts necessary to support a ripe unfair labor practice.").

Whether the Second Amendment challenges the sale of the trucks or the execution of the Agreements, under Board precedent, the allegations are clearly time-barred. The Union had notice of the sale of the trucks at least as early as August 2016. (Tr. 114-15.) The Union also aware of a contractual arrangement between Mike-sell's and its distributors, as evidenced by its request on August 31, 2016, for "[a] copy of the agreement between Mike-sell's and the entity to whom Route No. 104 and Route No. 122 is scheduled to be sold." (JX-8, p. 2 (emphasis added).) The Union's second amendment must therefore be dismissed as untimely on its face.

2. The Second Amendment Does Not Relate Back to the Original Charge.

Not only is the Second Amendment untimely, but it also does not relate back to original Charge No. 09-CA-184215. Under *Redd-I, Inc.*, 290 NLRB 1115 (1988), unfair labor practice allegations that are otherwise time-barred by Section 10(b) of the Act may be litigated if they are legally and factually "closely related" to allegations of a prior timely filed charge. *In re the Carney Hosp.*, 350 NLRB 627, 628 (2007). In determining whether an amendment relates back to an earlier charge for 10(b) purposes, the Board applies a three-prong test: (1) whether the otherwise untimely allegations involve the same legal theory as the timely charge; (2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the timely charge (i.e. similar conduct with a similar purpose); and (3) whether the same defenses would be anticipated in response to both the untimely and timely

charge allegations. *Redd-I, Inc.*, 290 NLRB at 1118; *see also* See *Peerless Pump Co.*, 345 NLRB 371, 374 (2005); *Fiber Products*, 314 NLRB 1169 (1994*)*; *Marriott Corp.*, 310 NLRB 1152, 1160 (1993).

The Union will likely argue that its blatant untimeliness should be excused because the Second Amendment somehow "relates back" to original Charge No. 09-CA-184215. However, the untimely allegations do not involve the same legal theory as the original charge allegations. The original allegations stem from the Union's claim that the Company refused to bargain before changing its business model through the sale of routes. The untimely allegations, however, are not based on a refusal to bargain but one that, by the Union's own words, stems from "a unilateral change unrelated to an obligation to bargain." (Tr. 23.) A refusal to bargain is sometimes treated differently than a unilateral change. *See Gentzler Tool & Die Corp.*, 275 NLRB 881, 882 (1985) (recognizing separate violations in unilateral changes and refusals to bargain); *Preterm, Inc.*, 273 NLRB 683, 696 (1984) (same). Indeed, unilateral change allegations usually involve situations where an employer changes certain terms of employment without notice to the Union, and thus without even giving the Union the opportunity to demand bargaining. *See, e.g., Weingart Ctr. Ass'n*, 289 NLRB No. 82, *2 (June 30, 1988). That is not the case here, as it is undisputed that the Union received advance notice of all of the Company's actions, despite its choice not request bargaining over some of them. (Tr. 82, 173-74, 376-77.)

Further, the legal theory and Board precedent surrounding the Company's decision to convert to a distributorship model, and whether the Company must bargain with the Union over that change, is governed by *First National Maintenance* and its progeny. It is a factually intensive inquiry and one that implicates the core rights of a business as a going concern. The decision of Mike-sell's to sell its trucks or to execute contracts with owner-operators, however, does not implicate *First National Maintenance* and cannot be compared with a change in business model or an alleged refusal to bargain.[70] Thus, the Second Amendment implicates vastly different legal theories, and as such, the Second Amended Charge cannot relate back to original Charge No. 09-CA-184215.

[70] The same problem would arise even under the General Counsel's preferred *Dubuque* test, as neither the sale of trucks nor the execution of contracts is remotely related to the relocation of a business.

In addition, although Mike-sell's happened to sell two of its trucks to distributors who purchased its routes, the Company would have been at least equally satisfied to sell the trucks to anyone who wanted to buy them at the same price, as the sale of the trucks furthered its goal to alter its business model.[71] Neither TMT or BLM were required to purchase trucks when they bought the routes, and Mike-sell's did not sell the trucks for the same reason it sold the routes. When it sold the routes, Mike-sell's was directly furthering its goal of changing its business model. When it sold the trucks, the Company did so simply because there were willing buyers for assets no longer needed, and that could be liquidated and reinvested. In other words, Mike-sell's could have sold the routes without also selling the trucks, or Mike-sell's could have sold the trucks to a used car lot, or to a private individual, if TMT and BLM did not want them. In short, while the sale of trucks was fortuitously connected to the sale of the routes, it was also incidental and not sufficiently factually-tied to the sale of routes for the Second Amendment to relate back.

Finally, the defenses to the Second Amendment are different than those to original Charge No. 09-CA-184215. The former involves a unilateral change to a term or condition of employment, in the absence of an affirmative demand to bargain. The latter, however, involves the parties' bargaining history, arbitration decisions, past practices, fundamental principles of federal labor law, and the Company's evolving business model. The Union simply cannot argue that the two sets of allegations are the same such that they can be summarily lumped together—particularly when the Second Amendment is so vague that it is unclear what conduct is actually being challenged. Mike-sell's has diligently preserved evidence and prepared its defense to original Charge No. 09-CA-184215, and even the first charge amendment (which actually served to reduce, rather than expand, the scope of the allegations). But the Union cannot be permitted to belatedly tack-on vague new claims surrounding a yet-to-be-identified "unilateral change" that it could have brought alleged in original Charge No. 09-CA-184215 or even its first amendment.

[71] In fact, Mike-sell's likely would have been even happier to sell its trucks to buyers who wanted to immediately pay the full price in cash.

3. Mike-sell's Did Not Unilateral Change Drivers' Terms of Employment.

The Union presented no evidence whatsoever regarding the alleged unilateral change, either through the sale of the trucks or the execution of the Agreements. In fact, neither the General Counsel nor the Union has given any explanation whatsoever regarding the Second Amendment's vague reference to the unilateral changes related to "contracts for owner operator equipment." (GC-2.)

Mike-sell's did not unilaterally alter any terms of any driver's employment, and the Union presented no evidence that it did. There is nothing in the Expired Contract (or the Revised Final Offer) which prohibits Mike-sell's from selling trucks to distributors or from contracting with distributors, nor does any language in the Expired Contract (or Revised Final Offer) discuss owner-operators in connection with route eliminations. In fact, in litigation the 2012 arbitration over the sale of a route, neither the Union, nor the Company, nor the Arbitrator made mention of the completely separate and unrelated owner-operator language in Article XIV of the Expired Agreement. (JX-1, p. 21.) This is compelling evidence that the owner-operator provision was completely unrelated to the sale of routes. In short, given the complete lack of evidence submitted by the Union and the Board concerning the alleged unilateral change, and given the Company's clear right to sell its trucks and clear practice of entering contracts with distributors after prior written notice with the Union, the Second Amendment should be dismissed.

IV. CONCLUSION

Not only is the Second Amendment untimely, but also Mike-sell's did not violate 8(a)(1) or 8(a)(5) of the Act by (1) refusing to bargain over its decision to sell sales territory to independent distributors; (2) refusing to provide information sought by the Union for such decisional bargaining; or (3) selling Company vehicles to or entering contracts with independent distributors. Thus, the General Counsel's entire Complaint should be dismissed.

V. PROPOSED CONCLUSIONS OF LAW

The General Counsel has not proven by a preponderance of the evidence that Mike-sell's violated Section 8(a)(1) or 8(a)(5) of the Act, as alleged in the Complaint.

VI. PROPOSED ORDER

The Complaint should be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2017, the foregoing was served via electronic filing to Administrative Law Judge Andrew S. Gollin, located at 1015 Half Street SE, Washington, DC 20570-0001, and at andrew.gollin@nlrb.gov, with additional service copies sent as follows:

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